

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-193403; B-193411
B-193418

DATE: August 14, 1979

MATTER OF: Security Assistance Forces and
Equipment OHG

DL 601388

DIGEST:

[Protest of Army Award of Contract for Purchase and Installation of
Smoke Detectors]

1. Protest of cancellation of request for proposals (RFP) is untimely where filed more than 10 working days after protester knew of basis of protest.
2. Claim for proposal preparation costs based on alleged improper cancellation of RFP will not be considered where protester files untimely protest of cancellation since to do so would allow protester to circumvent GAO requirement that protests be timely filed.
3. Protests alleging agency is engaged in unwarranted and unjustified campaign to preclude ionization-type smoke detectors through specifications which limit procurements to photoelectric-type smoke detector are untimely since protests were not filed before closing dates for receipt of offers under the RFP's in question.
4. Protest alleging protester is entitled to award rather than awardee since its offer made in United States currency was lower than awardee's offer made in German currency as of the date of award using Deutsche Bundesbank official exchange rate, rather than official obligation rate used by agency, is untimely since it was filed more than 10 working days after basis of protest was or should have been known.

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5. *He* Agency improperly found awardee's technical proposal to be technically acceptable where RFP specifications required "smoke detectors with accessories" to be manufactured in United States and awardee offered foreign made alarm bell. Since smoke detectors were required to have self-contained alarm buzzers, required alarm bells can only be accessories under RFP.

Finally 6. *He* Agency properly awarded contract to second low offeror since agency could not have accepted offer made by protester as agent for another firm, because protester was not authorized to enter into contracts with Government on behalf of other firm.

~~Security Assistance Forces & Equipment OHG-~~
(SAFE) has protested the cancellation of request for proposals (RFP) No. DAJA76-78-R-0439 and also the award of a contract to the second low offeror under RFP No. DAJA76-78-R-0529. Both solicitations were issued by the United States Army Procurement Agency, *AB-C00315* Europe (USAPAE), Frankfurt Area Procurement Office (FAPO), for the purchase and installation of smoke detectors in Army-owned family housing in Germany. In addition, SAFE has protested the award of a contract under RFP No. DAJA25-78-R-0019, issued by the Bremerhaven Area Procurement Office (BAPO) of USAPAE, which also was for the purchase and installation of smoke detectors in Army-owned family housing. FAPO and BAPO act as the procurement offices for various users within the Army in Germany. For the reasons given below SAFE's protests are dismissed in part, denied in part, and sustained in part.

B-193403-RFP No. DAJA76-78-R-0439

On July 25, 1978, FAPO issued the subject RFP for the purchase and installation of smoke detectors in Army-owned housing. The RFP required offerors to provide a Statitrol brand smoke detector or its equivalent. The specifications, however, described the

Statitrol smoke detector as a photoelectric-type smoke detector when in fact it was an ionization-type detector. Award was to be made on the basis of price.

Five proposals were submitted in response to the RFP and SAFE was the apparent low offeror. SAFE offered the Statitrol smoke detector required by the RFP but pointed out that the Statitrol smoke detector had been incorrectly described as a photoelectric-type smoke detector. Upon learning of the ambiguous smoke detector description, the contracting officer issued amendment No. 1 which substituted an Electro Signal LAB brand smoke detector for the Statitrol smoke detector and solicited best and final offers. Under the specifications ionization-type smoke detectors were not acceptable.

SAFE once again submitted the lowest offer and again offered a Statitrol smoke detector. SAFE's proposal also indicated that SAFE considered the substitution of the Electro Signal LAB detector for the Statitrol detector as part of a continuing campaign to preclude the installation of ionization-type smoke detectors. SAFE maintained that there was nothing in American or German law to support the decision to preclude ionization-type detectors from consideration. SAFE further indicated that if evidence was provided to justify the exclusion of ionization-type detectors, it offered three smoke detectors, including the Electro Signal LAB, "under protest" as alternatives.

On September 22, 1978, the contracting officer requested SAFE to provide descriptive literature on the items it proposed to furnish. SAFE responded by a letter dated September 25, 1978, in which it forwarded descriptive literature on the Statitrol detector and one of SAFE's proposed alternates. SAFE did not provide literature on the Electro Signal LAB smoke detector or SAFE's remaining proposed alternate. SAFE also stated that USAPAE historically had been "guilty of unwarranted attempts to preclude the use of ionization-type smoke detectors" and that it assumed the contracting officer might be continuing

those attempts. SAFE reiterated that its primary offer was for the Statitrol detector and that the other detectors were being offered "under protest."

Thereafter, FAPO conducted a technical evaluation of the smoke detectors proposed by SAFE and the other offerors. The technical evaluation revealed that the Statitrol detector offered by SAFE was an ionization-type detector and therefore not in compliance with the specifications. However, the technical evaluator recommended that the contracting officer contact the activity requiring the smoke detectors to see whether the RFP specifications reflected the user's actual minimum needs and the contracting officer so inquired. The evaluator also determined that the user may have failed to include some minimum performance standards in the RFP. On September 29, 1978, the user requested the contracting officer to cancel the solicitation in order to allow it to revise specifications to include both ionization and photoelectric smoke detectors. The user decided to cancel the RFP rather than reopen negotiations with revised specifications due to the impendent end of the fiscal year.

SAFE maintains that FAPO canceled the RFP as part of a continuing and unwarranted campaign to preclude the use of ionization-type smoke detectors in Army-owned housing. SAFE argues that there is no justification for precluding ionization-type smoke detectors under local German law as argued by the Army in its reports on SAFE's protests in B-193411 and B-193418, and that the RFP specifications limiting the procurement to photoelectric smoke detectors were unduly restrictive. Accordingly, SAFE requests proposal preparation costs.

The Army maintains that SAFE's protest of the RFP cancellation, as well as its objections to the RFP specifications, are untimely. In this regard, the Army asserts that since SAFE was first notified that the RFP had been canceled by a letter dated September 30, 1978, and that SAFE was again notified by a letter dated October 12, 1978, its protest of the cancellation is untimely under our Bid Protest

Procedures which require protests of this nature to be filed within 10 working days after the basis of protest is or should have been known. See 4 C.F.R. § 20.2(b)(2) (1978).

The Army further observes that SAFE's objections relating to the RFP specifications involve alleged defects in the RFP which were apparent on the face of the RFP and therefore should have been protested prior to the closing date for receipt of offers. Since SAFE did not protest the alleged restrictive specifications prior to the revised closing date for receipt of offers, the Army asserts that SAFE's objections are untimely under our Bid Protest Procedures. See 4 C.F.R. § 20.2(b)(1).

We agree that SAFE's protest of FAPO's decision to cancel the RFP is untimely, but we do not fully agree with the reasoning of the Army. A careful examination of the record reveals that by October 16, 1978, SAFE knew or should have known of the basis of its protest since on that date it sent a letter to FAPO in which it stated: "* * * we have reason to believe that there are elements involved in this procurement action that are such as to permit this company to claim bid cost compensation from the Government * * *." Although the record does not indicate exactly to what "elements" SAFE was referring, we believe the letter indicates that SAFE had determined a basis for protesting the cancellation. Since the protest was not received by our Office until November 2, 1978, it is untimely under 4 C.F.R. § 20.2(b)(2).

SAFE's objections that the RFP specifications improperly precluded the use of ionization-type smoke detectors also are untimely. Our Bid Protests Procedures require that protests of allegedly defective specifications be filed prior to the closing date for receipt of offers. See 4 C.F.R. § 20.2(b)(1). SAFE did not protest the RFP specifications prior to the revised closing date for receipt of offers. The fact that SAFE submitted its offer "under protest" does not satisfy our requirement that protests of allegedly

restrictive solicitation be filed prior to the closing date for receipt of offers. Emerson Electric Co., B-184346, September 9, 1975, 75-2 CPD 141.

Since SAFE's protest of the Army's cancellation is untimely, we will not consider its claim for proposal preparation costs. To do so would allow SAFE to circumvent the timeliness requirements of our Bid Protest Procedures. Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412; see also DWC Leasing Company, B-186481, November 12, 1976, 76-2 CPD 404.

B-193418 - RFP. No. DAJA76-78-R-0529

This RFP was issued by FAPO on August 11, 1978, with September 1, 1978, designated as the closing date for receipt of offers. The RFP provided that award would be made on the basis of price and, like RFP No. DAJA76-78-R-0439 discussed above, the RFP initially required offerors to provide a Statitrol smoke detector or its equivalent but incorrectly described it as a photoelectric-type detector. Subsequently, on August 28, 1978, FAPO amended the RFP by substituting the Electro Signal LAB smoke detector for the Statitrol smoke detector and postponed the closing date for receipt of offers until September 11, 1978.

Ten offers were submitted in response to the RFP. W. Lissmann Ing. grad. (Lissmann) submitted an offer of 145,691.80 Deutschemark (DM) and SAFE submitted an offer of \$74,800. Once again SAFE offered to provide Statitrol smoke detectors as well as offering three photoelectric smoke detectors "under protest" as alternatives as it did under RFP No. DAJA76-78-R-0439. SAFE also repeated its charges that FAPO was engaged in a campaign to preclude ionization smoke detectors.

Thereafter, FAPO evaluated all the items offered by SAFE because it did not consider SAFE to have filed a formal protest. During the course of the evaluation FAPO requested SAFE to provide additional technical literature on the items offered by SAFE "under protest."

In response to that request SAFE submitted additional information, but the information was not sufficient to evaluate all of the items offered "under protest." Since Lissmann offered to provide Electro Signal LAB smoke detectors required by the RFP and its offer of DM 145,691.80 or \$72,845.90 was the lowest offer received as of the closing date using the official obligation rate of DM 2.00 for each U.S. dollar, Lissmann was awarded the contract on September 29, 1978.

SAFE maintains that it is entitled to the contract because its offer was lower than Lissmann's as of the time of award. SAFE asserts that on September 29, 1978, Lissmann's offer of DM 145,691.80 was equal to \$75,308.49 using the Deutsche Bundesbank's official conversion rate of DM 1.9346 per \$1.00 and therefore higher than SAFE's offer of \$74,800. SAFE also maintains that Lissmann's proposal was technically unacceptable because Lissmann did not offer a U.S. made alarm bell which in SAFE's view was required by the RFP specifications. In this regard SAFE relies on paragraph 12 of the "General Requirements" section of the RFP which required the smoke detectors with accessories to be manufactured in the United States. SAFE further protests that FAPO is engaged in an unwarranted campaign to preclude the use and installation of ionization-type smoke detectors in Army-owned family housing in Germany. This last objection is untimely because it was not filed prior to the closing date for receipt of offers, and will not be considered.

The Army asserts that SAFE's protest of the award to Lissmann on the basis that its offer was lower than Lissmann's is also untimely. The Army maintains it notified SAFE that Lissmann had been awarded the contract by a letter dated September 29, 1978, and it subsequently informed SAFE of Lissmann's offer of DM 145,691.80 by a letter dated October 12, 1978. The Army argues that SAFE's protest, filed with our Office on November 7, 1978, is untimely because that date is more than 10 working days after SAFE knew or should have known of the basis of its protest.

We agree. SAFE was informed of the award price by a letter dated October 12, 1978, and the record indicates that SAFE received the Army's letter sometime between October 12, 1978, and October 16, 1978. (On October 16, 1978, SAFE wrote a letter to the contracting officer acknowledging receipt of the Army's letter of October 12, 1978, and questioning the exchange rate used by the Army. SAFE also indicated it appeared likely that it would be filing a protest.) Although SAFE did not know what exchange rate the Army used, it was aware of Lissmann's offer and knew or should have known the Deutsche Bundesbank's official conversion rate for the period when the award was made. In this regard, SAFE states that it did not know the exact date of award but it presumed award took place after September 25, 1978, the date by which it was required to submit additional technical information. Accordingly, we believe SAFE knew or should have known that the contract was awarded to Lissmann at a higher price than SAFE's offer as of the date of award. Consequently, we view the November 7, 1978, protest as untimely filed.

With respect to SAFE's allegation that Lissmann's proposal was technically unacceptable because it failed to offer a United States-made alarm bell, the Army responds that a United States-made alarm bell was not required by the RFP specifications. In this regard we note that Paragraph 12 of the "General Requirements" section of the RFP required that "[a]ll smoke detector units with accessories" to be manufactured in the United States.

We agree with the Army that both smoke detectors and smoke detector accessories were required by the RFP language to be manufactured in the United States. However, we cannot agree that alarm bells were not accessories within the terms of the RFP, as to do so would defy the plain meaning of the word "accessory." An accessory is defined by Webster's New Collegiate Dictionary (1977 ed.) as "an object or device not essential in itself but adding to the * * * convenience or effectiveness of something else * * *." Since the smoke detectors were required to have a self-contained

alarm buzzer with the alarm bells to be connected to the detectors to provide an additional alarm, we believe that the alarm bells were clearly "accessories." The mere fact that the alarm bells were a separate line item in the RFP, does not, as argued by the Army, mean they were not "accessories" within the meaning of the RFP language. We believe that since the Army was purchasing commercially available smoke detectors with self-contained alarm buzzers, the alarm bells would logically be listed as a separate line item. Although the Army may not have intended to require alarm bells be manufactured in the United States, by requiring accessories to be manufactured in the United States, they required alarm bells to be made in the United States.

Consequently, we believe that the Army improperly found Lissmann's proposal to be technically acceptable. However, inasmuch as the work under this RFP has been substantially completed it would not be in the best interests of the Government to recommend any corrective action.

B-193411 - RFP No. DAJA25-78-R-0019

RFP No. DAJA25-78-R-0019 was issued by BAPO in its original form on September 14, 1977, with award to be made on the basis of price. After a series of delays due to various revisions of the RFP specifications, BAPO awarded a contract to Hanns Petersenn (Petersenn), the second low offeror, on September 30, 1978. BAPO did not accept SAFE's lower offer because BAPO found SAFE to be nonresponsible. Specifically, the Army determined that SAFE had on several occasions cited nonexistent contractual requirements in order to obtain customs clearance documents from USAPAE. According to the Army, these documents allowed SAFE to import smoke detectors into Germany duty-free even though they were not for use on Government contracts, in violation of German law.

SAFE maintains that its responsibility was irrelevant because it submitted its offer as an agent for Emerson Electric Company (Emerson) rather than in its own name. Accordingly, SAFE asserts that Emerson, as the low responsible and technically acceptable offeror, was entitled to the award. SAFE also objects to the

Army's conclusion that it violated German customs laws. SAFE argues that any violations were unintentional and presents evidence which indicates that all smoke detectors imported into Germany duty-free under clearance documents issued by USAPAE were used on other Government contracts. SAFE further argues that the fact that it has not been suspended or debarred for the alleged violations supports its view that it is a responsible offeror.

We believe the evidence establishes that SAFE was not authorized to enter into a contract with the Government on behalf of Emerson when SAFE submitted an offer under the RFP. In a letter sent to our Office at the urging of SAFE, the Vice-President of Marketing for the Statitrol Division of Emerson states that SAFE was not Emerson's agent as of September 29, 1978, the date of award to Petersenn. Emerson indicates that while SAFE was its agent for the installation, maintenance and warranty replacement of residential smoke detectors until June 30, 1978, SAFE was only an authorized distributor as of September 29, 1978. Emerson further notes that SAFE's misrepresentation of its agency relationship stems from SAFE's misinterpreting the termination of its previous relationship and was not intentional.

Inasmuch as SAFE was not authorized to act on behalf of Emerson and it is clear that SAFE did not intend to submit an offer in its own capacity, the Army could not have properly accepted SAFE's offer in any event. Although the Army improperly interpreted SAFE's offer as its own and based its award to Petersenn on the grounds that SAFE was nonresponsive, it is obvious that the rejection of SAFE's proposal was proper. Thus, we need not consider whether SAFE was properly found to be nonresponsive.

SAFE also maintains that BAPO's actions are evidence of another effort to "harass" SAFE and again argues that BAPO is engaged in an unjustified campaign to preclude the use of ionization-type smoke detectors. We have found no evidence to support SAFE's allegations that BAPO has intentionally

"harassed" SAFE and will not consider SAFE's objections regarding the use of ionization-type smoke detectors because SAFE did not protest the restriction prior to the closing date for receipt of offers as it was required to do under our Bid Protest Procedures.
See 4 C.F.R § 20.2(b)(1).

The protests are dismissed in part, denied in part, and sustained in part.

R. F. K. 11/14
Deputy Comptroller General
of the United States